79236-4

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SUPREME COURT NO. 79236-4
COURT OF APPEALS NO. 23698-6-III

IN THE SUPREME COURT OF WASHINGTON

FILED
OCT 20 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALYSSA KNIGHT,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Jerome LeVeque, Judge

ANSWER AND CROSS PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. ISSUES PRESENTED IN ANSWER

The state seeks review of two issues in State v. Knight, 134 Wn. App. 103, 138 P.3d 1114 (2006), attached as appendix A. Knight opposes the state's petition and raises one independent claim for review.

1. Knight argued her offender score was incorrectly calculated because a current conviction for conspiracy to commit second degree robbery counted two points as a "violent offense" even though anticipatory crimes for class B felonies are expressly excluded from the definition of "violent offense." In rejecting Knight's argument, Division Three relied on Division One's decision in State v. Becker, 59 Wn. App. 848, 801 P.2d 1015 (1990). Where Division One's decision in Becker conflicts with case law from this Court, fails to apply the rule of lenity, and is poorly reasoned, should this Court grant review and overrule Becker?

2. Did the Court of Appeals' refusal to apply the rule of lenity deny Knight her federal and state constitutional right to due process of law?

B. COUNTERSTATEMENT OF ISSUES IN STATE'S PETITION

1. Did the Court of Appeals properly rely on settled authority from this Court – State v. Bobic, infra – to hold that a single conspiracy cannot be segmented into multiple charges and convictions without violating the double jeopardy clauses of the state and federal constitutions?

2. For the first time in a motion to reconsider, the state claimed Knight could not challenge the double jeopardy violation without risking involuntary withdrawal of her plea. But Knight's plea agreement specifically permitted her to argue for any sentence allowed by law and also allowed her to appeal the sentence. Knight also clearly performed her part of the bargain, testifying for the state and putting herself at risk. Should review be denied because Knight did not breach the plea agreement and because, as Knight explained in her answer in the Court of Appeals (attached as appendix B), the state's claim lacks merit?

C. STATEMENT OF THE CASE

Knight pled guilty to three counts as charged in the state's amended information: count I, conspiracy to commit second degree robbery; count II, conspiracy to commit first degree burglary; and count III, second degree murder. CP 11-20; 1RP 2-18. The state had initially charged Knight with five counts. CP 4-7. The state and Knight entered a plea agreement that required her to testify against two codefendants. She also agreed to forfeit her vehicle. CP 15, 35-37. In exchange for these concessions, the state agreed to file the amended information. CP 35-37; 1RP 10-12. The parties also agreed that both "will be free to argue for any sentence allowed by law." CP 35. The state included no language in the plea agreement or the standard plea form to suggest it intended the deal to require Knight to waive her right

to appeal or to argue double jeopardy. CP 13-14; 35-37. The state, at best, simply overlooked the double jeopardy claim.

Knight testified at the trials of two codefendants. She put herself and her family at significant risk. As stated in the Brief of Appellant, "[t]here is no question she fulfilled her side of the plea bargain." BOA at 4 (citing CP 33-34, 1RP 32-25; 2RP 4-5, 10-12, 15-16; 3RP 5-10). At sentencing, both parties made their recommendations. 1RP 31-32 (prosecutor recommended the standard range, without arguing any breach of the plea agreement); 1RP 33-35 (defense recommended the standard range, asserting Knight complied with the plea agreement).

Knight subsequently appealed, raising two arguments challenging her sentence. Knight initially argued the count II and III offender scores were incorrect because they included two points for count I. But because conspiracy to commit second degree robbery is not a "violent offense," it should have counted only as one point. Knight argued at length why Division One's contrary decision in State v. Becker was incorrect and why it conflicted with settled authority from this Court. BOA at 13-24.

The state responded to Knight's brief by relying on Becker. The state's analysis can be summed up in its own words: "[t]he defendant [sic] spends much time complaining about Becker, but the bottom line is that the case exists and is dispositive of the issues here." BOR at 3.

In a supplemental brief, Knight argued counts I and II constituted a single unit of prosecution because there was only one agreement. Under State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000), and State v. Williams, 131 Wn. App. 488, 128 P.3d 98 (2006), review pending, No. 78397-7, (set for consideration 10/31/06), there could be only one conspiracy. Supp'l BOA at 4-8.

The state responded with a short supplemental response. This time the state argued Williams was wrongly decided. Supp'l BOR at 3-7. Oddly, it did not argue Williams "exists and is dispositive."

Knight's opening and supplemental briefs made it very clear she did not seek to withdraw her plea. BOA at 3, n.3; Supp'l BOA at 7, n.4. She instead sought the following relief:

> This Court should vacate the erroneous count II and III sentences and remand for resentencing within the correctly calculated standard ranges.

BOA at 24.

> For the reasons stated above, the count II conviction should be vacated. And for the reasons stated above and in the opening brief, the trial court should resentence Knight on counts I and III with an offender score of one point each.

Supp'l BOA at 9.

Despite the clarity of Knight's briefing (or perhaps because of that clarity), neither of the state's appellate briefs claimed her appeal undermined

the plea agreement. If the state had made such an argument, Knight would have filed a reply brief fully explaining why the state was wrong. The Court of Appeals then would have had a fair opportunity to fully consider and reject the state's position. Appendix B, at 11-15.

After receiving the state's supplemental response brief, the Court of Appeals issued a published opinion. The opinion rejected Knight's Becker argument, Knight, at 107-09, but accepted the Bobic argument. Based on this Court's decision in Bobic and its own decision in Williams, the Court struck count II, concluding there was only one count of conspiracy. Knight, at 109-10. The decision expressly held Knight's plea did not waive her right to argue the two conspiracy convictions were barred by double jeopardy. Knight, at 109 (citing State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002)). The state could not have been surprised by this ruling, as Knight's supplemental brief cited Cox and other cases for this proposition. Supp'l BOA at 5, and at 7, n.4.

The plea agreement also did not waive Knight's constitutional right to appeal. Const. art. 1, § 22. Waiver of that right will not be presumed and occurs only when the state establishes a knowing, intelligent and voluntary waiver. State v. Kells, 134 Wn.2d 309, 313-14, 949 P.2d 818 (1998).

The state now seeks review of two issues. Knight asks this Court to reject the state's petition, but to grant review and overturn Division One's decision in Becker.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

DIVISION ONE'S DECISION IN BECKER IS INCORRECT AND CONFLICTS WITH SETTLED RULES OF CONSTRUCTION FROM THIS COURT.

In Knight's offender score for counts II and III, the trial court included two points for count I. It did this under the mistaken belief that count I was a "violent offense" and therefore scored as two points. Because conspiracy to commit second degree robbery is not a "violent offense," the trial court erred.

Because count III is a "serious violent offense," other convictions for "violent offenses" count two points in her offender score. RCW 9.94A.525(9). As explained in Knight's opening brief, under the plain terms of RCW 9A.56.210(2), RCW 9.94A.030(45)(a) and RCW 9.94A.525(9), conspiracy to commit robbery should count only as one point. Unlike a completed offense, an anticipatory offense like conspiracy is not a "violent offense" when the completed offense is a class B felony. BOA at 7-9. Knight's brief then explained why the offender score error is prejudicial. BOA at 9-12 (citing inter alia, State v. Parker, 132 Wn.2d 182, 186-188, 937 P.2d 585 (1997)).

Knight also included a lengthy discussion and analysis of the reasons why Division One's contrary decision in State v. Becker conflicts with substantial authority from this Court. BOA at 12-24. The SRA's definition section is important and its definitions must be used throughout the SRA. The "violent offense" definition must be given the meaning the Legislature intended. The "rule of lenity" requires ambiguous statutes to be construed against the state. Because the Becker court overlooked these settled rules, it was wrongly decided and should not be followed. BOA at 13-24.

By relying on Division One's decision in Becker, the Court of Appeals decision conflicts with substantial authority from this Court. This Court should grant review. RAP 13.4(b)(1). Furthermore, where this Court has not addressed the Becker claim, and in fact has never cited Becker, this Court should grant review to decide this issue of substantial public importance. RAP 13.4(b)(4).

E. ARGUMENT WHY THE STATE'S PETITION SHOULD BE DENIED

The state offers several claims that the Court of Appeals decision warrants review. The claims lack merit.

1. THE COURT OF APPEALS PROPERLY RELIED ON THIS COURT'S DECISION IN BOBIC TO CONCLUDE THERE WAS ONE CONSPIRACY, NOT TWO.

The state and federal constitutions prohibit placing someone in jeopardy twice for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; State v. Bobic, 140 Wn.2d at 260. As this Court held in Bobic, the "unit of prosecution" under Washington's criminal conspiracy statute is "an agreement and an overt act rather than the specific criminal objects of the conspiracy." Bobic, at 265-66 (construing RCW 9A.28.040(1)). The proper remedy is to vacate the erroneous multiple convictions and resentence on the remaining proper count. Bobic, at 267.

In Bobic, this Court addressed the question whether the state could pursue multiple convictions when a single conspiracy had multiple objectives. Although Bobic and his coconspirators had multiple objectives, this Court unanimously rejected the state's claim, holding there was only one agreement under RCW 9A.28.040. Bobic, at 262-66. This Court accordingly struck two of the three conspiracy convictions as violating double jeopardy. Bobic, at 266.

The Court of Appeals expressly followed Bobic and its remedy. This is the appropriate remedy for a double jeopardy violation, even where multiple convictions follow a guilty plea. In re Personal Restraint of Butler, 24 Wn. App. 175, 178, 599 P.2d 1311 (1979) (striking one count and resentencing on other where plea to both violated double jeopardy). Because the Court of Appeals correctly followed Bobic, no conflict merits this Court's review.

2. THE STATE'S CLAIM THAT KNIGHT CANNOT APPEAL, OR THAT KNIGHT'S APPEAL ALLOWS THE STATE TO RECHARGE TWO COUNTS, IS MERITLESS.

For the first time in a motion to reconsider in the Court of Appeals, the state suggested Knight's appeal had negated her plea agreement and it should be permitted to rescind the plea and start over. Knight filed an answer in the Court of Appeals refuting the state's late and meritless claim. The state's claim remains meritless for the reasons stated in the answer (attached as appendix B), incorporated by this reference.

In its petition in this Court, the state has offered no further analysis to justify its position. Instead, the state offers rhetorical flourishes, contending it would be unfair to the state if a court strikes an unconstitutional conviction following a guilty plea. P4R at 7. The state does not mention that this is a settled remedy in Washington when a guilty plea to multiple counts violates settled principles of double jeopardy.

And with all due respect to the state, there is nothing unfair about holding it to contract language it drafted. Here the state agreed to drop charges and recommend a sentence within the standard range. In exchange, Knight agreed to plead guilty and testify for the state.

Knight expressly preserved her right to argue for any sentence allowed by law and to appeal the sentence imposed. If the state had meant for Knight to waive these rights, it could and should have drafted a plea agreement including those waivers. Appendix B, at 9-10.

In short, the state now seeks a windfall. It is asking this Court to write something into the plea deal the state never wrote itself, that the deal required Knight to waive her constitutional right to appeal or to constitutional protections against double jeopardy. In the alternative, the state asks this Court to impose an unwarranted remedy, which is to hold Knight can no longer benefit from the plea agreement even though she fully performed her end of the bargain. The state has cited no authority that supports such a remedy.

Finally, as shown in Knight's answer in the Court of Appeals, the state's reliance on State v. Ermels and State v. Turley is misplaced. Appendix B, at 5-11 (discussing and fully distinguishing State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) and State v. Ermels, 156 Wn.2d 528, 540, 131 P.3d 299 (2006)).

Because there is no conflict, and because the state's claim is meritless, this Court should deny review.

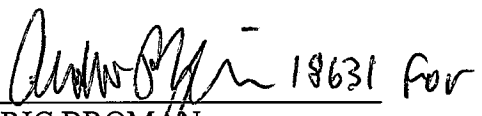
F. CONCLUSION

For the reasons stated above, this Court should grant Knight's request to review the Becker issue and deny the state's petition.

DATED this 9 day of October, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

No. 79236-4

C

Court of Appeals of Washington,
Division 3.
STATE of Washington, Respondent,
v.
Alyssa C. KNIGHT, Appellant.
No. 23698-6-III.

July 18, 2006.

Background: Defendant pled guilty in the Superior Court, Spokane County, Jerome L. Leveque, J., to second degree murder, conspiracy to commit first degree burglary, and conspiracy to commit second degree robbery. At sentencing the court applied the violent offense doubling provision of the Sentencing Reform Act to count the conviction for conspiracy to commit second degree robbery as two points on the offender score. Defendant appealed.

Holdings: The Court of Appeals, Schultheis, J., held that:
(1) crime of conspiracy to commit second degree robbery was treated the same as the completed crime for purposes of defendant's offender score, and
(2) conviction for both conspiracy to commit first degree burglary and conspiracy to commit second degree robbery violated principles of double jeopardy.
Reversed in part and remanded.

West Headnotes

[1] Sentencing and Punishment 1245
350Hk1245 Most Cited Cases
In computing defendant's offender score, her crime of conspiracy to commit second degree robbery was treated the same as the completed crime; thus, the violent offense doubling provision of the Sentencing Reform Act applied to count the conviction as two points on the offender score. West's RCWA 9A.28.040, 9A.56.210, 9.94A.525.

[2] Criminal Law 1042.5
110k1042.5 Most Cited Cases
A challenge to the offender score may be raised for the first time on appeal.

[3] Criminal Law 1139
110k1139 Most Cited Cases
The appellate court reviews the calculation of an offender score de novo.

[4] Statutes 190
361k190 Most Cited Cases
If, after examining the ordinary meaning of a statute's language as well as its context in the statutory scheme, there is more than one reasonable interpretation, courts will treat the statute as ambiguous.

[5] Statutes 241(1)
361k241(1) Most Cited Cases
When a statute is truly ambiguous, the statute will be interpreted in favor of the defendant pursuant to the rule of lenity.

[6] Double Jeopardy 151(4)
135Hk151(4) Most Cited Cases
Defendant's conviction for both conspiracy to commit first degree burglary and conspiracy to commit second degree robbery violated principles of double jeopardy and therefore required reversal of the burglary conviction; although the plans between defendant and her coconspirators changed day to day on the methods to be employed in robbing the victim, these plans all served the single criminal conspiracy. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9A.28.040.

[7] Double Jeopardy 134
135Hk134 Most Cited Cases
When a defendant is charged multiple times for violations of a single statute, the court must determine what unit of prosecution the legislature intended as the punishable act under that statute; double jeopardy protects the defendant from multiple convictions under the same statute for committing just one unit of the crime. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9A.28.040.

[8] Conspiracy 23.1
91k23.1 Most Cited Cases
In a prosecution for criminal conspiracy, the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan. West's RCWA

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9A.28.040.

[9] **Conspiracy 23.1**
91k23.1 Most Cited Cases

[9] **Conspiracy 24(2)**
91k24(2) Most Cited Cases
Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes; the one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. West's RCWA 9A.28.040.

****1115** Eric Broman, Eric J. Nielsen, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Kevin Michael Korsmo, Attorney at Law, Spokane, WA, for Respondent.

SCHULTHEIS, J.

***105** ¶ 1 Alyssa Knight pleaded guilty to second degree murder (RCW 9A.32.050), conspiracy to commit first degree burglary (RCW 9A.52. 020, 9A.28.040), and conspiracy to commit second degree robbery (RCW 9A.56.210, 9A.28.040). At sentencing, the court applied the violent offense doubling provision of the Sentencing Reform Act of 1981(SRA) (RCW 9.94A.525(8)) to count the conviction for conspiracy to commit second degree robbery as two points on the offender score.

¶ 2 On appeal, Ms. Knight contends conspiracy to commit second degree robbery is not a violent offense pursuant to the SRA's definitional statute, RCW 9.94A.030(45). She argues that the definitional statute controls, although the doubling provision provides that felony anticipatory offenses such as criminal conspiracies must be scored the same as completed offenses. RCW 9.94A.525(4). We disagree. However, we conclude that the record supports only one conspiracy conviction. Accordingly, we reverse the conviction for conspiracy to commit first degree burglary and remand for resentencing.

FACTS

¶ 3 Early in the morning on September 26, 2003, police responded to a reported shooting on Division Street in Spokane. Officers found Arren Cole dead from a gunshot wound to his lower back. Evidence led the police to Ms. Knight. Eventually she confessed that Mr. Cole was shot ***106** during a robbery planned by Ms. Knight and two men. According to the plan, Ms. Knight struck up a friendship with Mr. Cole, had sex with him at his hotel, and then lured him into an alley, where he was robbed and shot by Ms. Knight's confederates.

****1116** ¶ 4 Ms. Knight pleaded guilty to conspiracy to commit second degree burglary, conspiracy to commit first degree burglary, and second degree murder while armed with a firearm. She had no prior felonies in her criminal history.

¶ 5 At sentencing, the court used an offender score of four to compute Ms. Knight's standard sentence range. Each conspiracy conviction was treated as a serious violent offense and as another current offense pursuant to RCW 9.94A.525(1), (4), and (8). Consequently each conspiracy conviction counted two points. RCW 9.94A.525(4), (8). The resulting standard range for the second degree murder conviction with a 60-month firearm enhancement was 225 to 325 months. The court imposed 285 months of incarceration. [FN1]

> FN1. Ms. Knight's original counsel appointed on appeal filed an *Anders* brief (*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)) and a motion to withdraw. By order filed on October 17, 2005, the commissioner of court granted the motion to withdraw but ordered appointment of new counsel to brief the issues of the offender score and the sentencing range.

OFFENDER SCORE

[1][2][3] ¶ 6 Ms. Knight first contends the trial court erred in computing her offender score. She argues that conspiracy to commit second degree robbery is not specifically included in the definition of a violent offense and therefore is not subject to the SRA's doubling provision. Although this issue was not raised at sentencing, a challenge to the offender score may be raised for the first time on appeal. *State v. Ford*, 137 Wash.2d 472, 477, 973 P.2d 452 (1999). We review the calculation of an offender score de novo. *State v. Tili*, 148 Wash.2d 350, 358, 60 P.3d 1192 (2003).

¶ 7 The SRA doubling provision, RCW 9.94A.525(8), provides that if the present conviction is for a ***107** violent offense not covered elsewhere in the statute, each prior adult and juvenile violent felony conviction counts as two points. Convictions

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entered or sentenced on the same date as the current offense are counted the same as prior offenses. RCW 9.94A.525(1), .589(1)(a). "Violent offense" is defined in the general definitional statute as "[a]ny of the following felonies," including "[c]riminal solicitation of or criminal conspiracy to commit a class A felony," and robbery in the second degree. RCW 9.94A.030(45).

¶ 8 Robbery in the second degree is a class B felony. RCW 9A.56.210(2). Accordingly, conspiracy to commit second degree robbery is not a violent offense under the definitional provision of the SRA. RCW 9.94A.030(45). However, the offender score statute specifically provides that prior convictions for felony anticipatory offenses are scored as completed crimes. RCW 9.94A.525(4), (6). Ms. Knight contends the offender score statute conflicts with the definitional statute, which should override the offender score provisions due to principles of statutory construction and the rule of lenity.

¶ 9 Similar arguments were raised in *State v. Becker*, 59 Wash.App. 848, 801 P.2d 1015 (1990). In *Becker*, the sentencing court counted a prior conviction for attempted second degree robbery as two points pursuant to former RCW 9.94A.360 (1990), *recodified as* RCW 9.94A.525. Mr. Becker argued on appeal that the attempted robbery was not subject to the doubling provision because it was not defined as a violent offense. *Id.* at 850, 801 P.2d 1015. Noting that apparent conflicts in statutes should be reconciled so that each is given effect, *Becker* concluded that the definitional statute and the doubling provision could be harmonized by reading the plain language of each statute:

> The apparent conflict in the sections is based on the assumption that the attempted robbery can only receive two points if it is a "violent offense." Contrary to Becker's contention, the offense does not receive two points because it is a violent offense, but rather, it receives two points because the completed crime of robbery in the second degree would receive two points ***108** and the attempted robbery is to be treated as a completed crime. According to the plain language of [former] RCW 9.94A.360(5) the attempt must be treated the same as the completed crime. Such a reading of the two sections gives effect to ****1117** each section and does not distort the language of the sections.

Id. at 852, 801 P.2d 1015. The same reasoning applies in this case.

[4][5] ¶ 10 Our objective in construing statutes is to determine legislative intent. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). A statute's plain meaning is considered an expression of that intent. *Id.* If, after examining the ordinary meaning of the statute's language as well as its context in the statutory scheme, there is more than one reasonable interpretation, we will treat the statute as ambiguous. *Id.* at 600-01, 115 P.3d 281. When truly ambiguous, the statute will be interpreted in favor of the defendant pursuant to the rule of lenity. *Id.* at 601, 115 P.3d 281.

¶ 11 As discussed in *Becker*, counting an anticipatory crime of second degree robbery as two points is consistent with the statutory scheme. 59 Wash.App. at 852-53, 801 P.2d 1015. The more specific inclusion of attempted (or conspiracy to commit) robbery in the second degree as a completed serious violent offense prevails over the more general and older definitional provision. *Id.* at 853, 801 P.2d 1015. This conclusion is consistent with the legislative history of the doubling provision of RCW 9.94A.525. Id. at 853-54, 801 P.2d 1015. The plain language of the provisions supports no other reasonable interpretation.

¶ 12 Finally, *Becker* noted that if we were to accept the defendant's argument that the definition in RCW 9.94A.030 controlled, then RCW 9.94A.525(4) [FN2] would be rendered meaningless or superfluous. *Id.* at 854, 801 P.2d 1015. "To give a meaningful interpretation to the SRA as a whole, [RCW 9.94A.525(4)] must supersede the general definition of violent offense." *Id.*

FN2. Former RCW 9.94A.360(5).

***109** ¶ 13 For the reasons outlined in *Becker*, and consistent with RCW 9.94A.525(4), we conclude that the conspiracy to commit second degree robbery must be treated the same as the completed crime. The trial court properly applied the doubling provision to count this conviction as two points on the offender score.

DOUBLE JEOPARDY

[6] ¶ 14 Ms. Knight next contends in supplemental briefing that the conspiracy to commit first degree burglary should be vacated on grounds of double jeopardy. Citing this court's recent decision in *State v. Williams*, 131 Wash.App. 488, 128 P.3d 98 (2006), *petition for review filed* (Wash. Mar. 8, 2006) (No. 78397-7), she argues that the facts support only one conviction for criminal conspiracy: the conspiracy to

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rob Mr. Cole. Although Ms. Knight pleaded guilty to both conspiracy to commit second degree robbery and conspiracy to commit first degree burglary, she did not waive her right to claim double jeopardy on appeal. *State v. Cox*, 109 Wash.App. 779, 782, 37 P.3d 1240 (2002).

[7] ¶ 15 The state and federal constitutions guarantee that no person will be twice put in jeopardy for the same offense. U.S. Const. amend V; Const. art. I, § 9; ***State v. Bobic*, 140 Wash.2d 250, 260, 996 P.2d 610 (2000)**. When a defendant is charged multiple times for violations of a single statute, we must determine what unit of prosecution the legislature intended as the punishable act under that statute. ***Id.* at 261, 996 P.2d 610**. Double jeopardy protects the defendant from multiple convictions under the same statute for committing just one unit of the crime. ***Id.* at 261-62, 996 P.2d 610**.

[8][9] ¶ 16 Criminal conspiracy is defined by statute as an agreement to carry out a criminal scheme, along with a substantial step toward carrying out that agreement. RCW 9A.28.040(1); ***Bobic*, 140 Wash.2d at 262, 996 P.2d 610**; *Williams*, 131 Wash.App. at 496, 128 P.3d 98. As noted in *Williams*, the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan. ***110** *Williams*, 131 Wash.App. at 496, 128 P.3d 98. ***Bobic*** explains further:

> **"Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken **1118** to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

140 Wash.2d at 264-65, 996 P.2d 610 (quoting *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942)).

¶ 17 Here, as in *Williams*, Ms. Knight was a coconspirator in the robbery of Mr. Cole. She, Dione Williams, and another man developed a scheme to rob Mr. Cole and took substantial steps toward achieving that goal. "[A]ny number of acts in the days preceding the climax here could be labeled the substantial step that completed the crime of conspiracy." *Williams*, 131 Wash.App. at 497, 128 P.3d 98. Although the plans changed day to day on the methods to be employed in robbing Mr. Cole, these plans all served the single criminal conspiracy.

¶ 18 As in *Williams*, the record here supports only one conspiracy conviction: the conspiracy to commit second degree robbery (first degree robbery in *Williams*). The police reports that were referenced in Ms. Knight's guilty plea describe an earlier plan to enter Mr. Cole's hotel room with the intent to rob (the basis for the count of conspiracy to commit first degree burglary), but this plan was subsumed in the overall scheme that comprised the single criminal conspiracy.

¶ 19 Accordingly, the conviction for conspiracy to commit first degree burglary is reversed and the case remanded for resentencing.

WE CONCUR: SWEENEY, C.J., and KULIK, J.

134 Wash.App. 103, 138 P.3d 1114

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APPENDIX B

No. 79236-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, vs. ALYSSA KNIGHT, Appellant.	No. 23698-6-III ANSWER TO STATE'S MOTION TO RECONSIDER

I. IDENTITY OF ANSWERING PARTY

Appellant Alyssa Knight, through counsel of record, Nielsen, Broman & Koch, PLLC, requests the relief in part II.

II. STATEMENT OF RELIEF SOUGHT

The state's motion for reconsideration should be denied.

III. GROUNDS FOR RELIEF AND ARGUMENT

The state initially charged Ms. Knight with five counts. CP 4-7. The state and Ms. Knight later entered a plea agreement that required her to testify against two codefendants. She also agreed to forfeit her

vehicle. CP 15, 35-37. In exchange for these concessions, the state agreed to file an amended information charging three counts. CP 35-37; 1RP 10-12. The parties also agreed that both "will be free to argue for any sentence allowed by law." CP 35. Nothing in the agreement or the standard plea form waived her right to appeal or to argue double jeopardy. CP 13-14; 35-37.

Although not mentioned in the state's current motion, Ms. Knight testified at the trials of two codefendants. She put herself and her family at significant risk. As stated in the Brief of Appellant, "[t]here is no question she fulfilled her side of the plea bargain." BOA at 4 (citing CP 33-34, 1RP 32-25; 2RP 4-5, 10-12, 15-16; 3RP 5-10).

At sentencing, both parties made their recommendations. 1RP 31-32 (prosecutor recommends the standard range, without arguing any breach of the plea agreement); 1RP 33-35 (defense recommends the standard range, asserting that Ms. Knight complied with the plea agreement). Ms. Knight subsequently appealed, raising two arguments challenging her sentence.

Her opening and supplemental briefs made it very clear that she did not seek to withdraw her plea. BOA at 3, n.3; Supp'l BOA at 7, n.4. She instead sought the following relief:

> This Court should vacate the erroneous count II and III sentences and remand for resentencing within the correctly calculated standard ranges.

BOA at 24.

> For the reasons stated above, the count II conviction should be vacated. And for the reasons stated above and in the opening brief, the trial court should resentence Knight on counts I and III with an offender score of one point each.

Supp'l BOA at 9.

Despite the clarity of Ms. Knight's briefing (or perhaps because of that clarity), neither of the state's briefs argued that Ms. Knight's appeal would undermine the plea agreement. If the state had made such an argument, Ms. Knight would have filed a reply brief fully explaining why the state was wrong. This Court then would have had a fair opportunity to consider and reject the state's position.

After receiving the state's supplemental response brief, this Court issued a published opinion, rejecting one of Ms. Knight's sentencing arguments but accepting another. Based on Supreme Court authority and the decision in a codefendant's case, the opinion strikes count II, concluding there was only one count of conspiracy. State v. Knight, ___ Wn. App. ___, ___ P.3d ___, 2006 Wash. App. LEXIS 1504 (2006) (slip op. at 6-7,citing State v. Williams, 131 Wn.

App. 488, 128 P.3d 98 (2006) and State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000)). The decision expressly holds that Ms. Knight's plea did not waive her right to argue that the two conspiracy convictions were barred by double jeopardy. Knight, slip op. at 6 (citing State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002)). The state could not have been surprised by this ruling, as Ms. Knight's supplemental brief cited Cox and other cases for this proposition. Supp'l BOA at 5, and at 7, n.4.

The plea agreement also did not waive Ms. Knight's constitutional right to appeal. Const. art. 1, § 22. Waiver of that constitutional right will not be presumed; waiver can only occur when the state establishes a knowing, intelligent and voluntary waiver by proving it. State v. Kells, 134 Wn.2d 309, 313-14, 949 P.2d 818 (1998).

Nonetheless, the state has now filed a motion for reconsideration. The motion raises, for the first time, the state's novel claim that Ms. Knight has somehow "breached the [plea] agreement by her actions and the plea bargain should be nullified." Motion, at 3. The state does not explain, however, what part of the agreement was

allegedly breached. There are no factual allegations, let alone findings, to support a claim that the plea bargain has been breached.

The state's omissions are particularly glaring. The state does not discuss the fact that the plea agreement did not waive the right to appeal or to argue double jeopardy. The state does not discuss the fact that Ms. Knight truthfully testified at the trials of her codefendants, putting herself and her family at risk. The state does not discuss the fact that the trial deputy prosecutors never argued that Ms. Knight failed to comply with her obligations under the plea agreement.[1] The state does not discuss the trial court's finding that she complied with the agreement, when the court released her pending sentencing, as the plea agreement required. Ms. Knight then complied with the release conditions and returned to custody as required for sentencing. CP 42; 2RP 15-16; 3RP 8-10.

The state's motion instead relies on broad statements from two Washington Supreme Court decisions. Motion, at 2 (citing State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003); State v. Ermels,

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[1] At one hearing the trial deputy's comments instead supported Ms. Knight: "Ms. Knight has been cooperative, I don't disagree with that. She has been forthright, I don't disagree with that." 2RP 12.

156 Wn.2d 528, 540, 131 P.3d 299 (2006)). Neither case is remotely on point.

In Turley, the parties entered a plea bargain to two counts, escape and conspiracy to manufacture methamphetamine. Three years after sentencing the state realized the conspiracy count required a term of community placement. Turley moved to withdraw his plea to both counts because he had not been informed of that sentencing consequence, but the state opposed withdrawal on the escape charge. Turley, at 397. The trial court allowed withdrawal only of the conspiracy plea and the Court of Appeals affirmed. Turley, at 397-98.

The Supreme Court reversed. The court reasoned that Turley had pled guilty as part of a package deal and the state failed to show that Turley's choice of remedy was unjust. The court accordingly granted Turley's motion to withdraw both pleas. Turley, at 401.

There was no question Turley was misinformed of the direct consequences of the plea and that this was a "manifest injustice" supporting withdrawal of the plea. Turley, at 398-99. The "sole issue" decided in Turley was "whether a trial court may grant or deny a motion to withdraw a plea agreement as to each count separately

when the defendant pleaded guilty to multiple counts entered the same day in one agreement." Turley, at 398.

The court rejected the state's position and held that Turley had pled to a "package deal" that was not divisible. The court reasoned that pleas to multiple counts, entered at the same time and in one document, would presumptively be considered indivisible. But the court also recognized that this presumption would not apply if there are "objective indications to the contrary in the agreement itself[.]" Turley, at 400.

The Turley court noted that it would not consider unexpressed subjective manifestations of the parties' intent, only objective manifestations. Turley, at 400. Other courts have similarly held that a party's unilateral mistake will not undermine a plea contract, because that could reward the party for an unreasonable interpretation of a plea agreement. See, e.g., State v. Watson, 63 Wn. App. 854, 860, 822 P.2d 327 (1992).

The state also cites Ermels. As part of a plea agreement, Ermels pled guilty to a lesser charge and stipulated to an exceptional sentence and to facts supporting that sentence. He also expressly waived his right to appeal that sentence, preserving only the right to

argue that the sentence length was excessive. Nonetheless, on appeal he argued that the exceptional sentence was unlawful and that his waivers were not knowing and intelligent. Ermels, at 532-34.

Not surprisingly, the Supreme Court held that Ermels had waived his right to appeal the exceptional sentence. The court also held that Ermels could not appeal the sentence without undermining the entire plea deal. Crucial to the court's analysis was the fact that Ermels offered no objective manifestation of any intent to treat the plea agreement differently than the exceptional sentence, as he expressly waived the right to appeal both the conviction and the exceptional sentence. Ermels, at 540-41.

Ermels is quickly distinguished, as Ermels' plea agreement expressly waived the right to appeal the sentence. Here the plea agreement specifically permitted the parties to argue for any sentence supported by law. Furthermore, as a matter of both fact and law, Ms. Knight did not waive her right to appeal or to argue double jeopardy. CP 13-14, 35-37; Supp'l BOA at 5, 7 (citing State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002) (guilty plea does not waive double jeopardy claim, citing Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975)); accord In re Restraint of Butler, 24

Wn. App. 175, 178, 599 P.2d 1311 (1979) (remedy for double jeopardy in plea situation is to strike one count and resentence on the other)). None of this should have surprised the state, as Cox and the other cited cases were decided long before Ms. Knight's plea.

Turley also is easily distinguished. Turley moved to withdraw his plea in the trial court. Ms. Knight has not. Ms. Knight instead raised a double jeopardy claim on appeal, as permitted by settled Washington law. Unlike Mr. Turley, the state has shown no "manifest injustice" necessary to support withdrawal of the plea. Cf. Turley, at 198-99 (discussing the "manifest injustice" hurdle the defense must clear when seeking to withdraw a plea).

The state cannot make the necessary factual showing, because the document itself allowed the parties to "argue for any sentence allowed by law." CP 35. Furthermore, if the state had intended for the plea to waive Ms. Knight's right to appeal or to argue double jeopardy, it should have written that when it drafted the plea agreement. 3RP 7 (noting that the plea agreement "was prepared by the prosecution, not the defense").[2] Assuming arguendo the plea

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[2] It is not difficult to include such language. See e.g., State v. Perkins, 108 Wn.2d 212, 213-15, 737 P.2d 250 (1987) (the plea agreement expressly waived the right to appeal; the court affirmed the

agreement could somehow be ambiguous on this point, the agreement, like any contract, will be construed against the state as the drafter. State v. Bisson, 156 Wn.2d 507, 522, 130 P.3d 820 (2006) (citing State v. Skiggn, 58 Wn. App. 831, 795 P.2d 169 (1990) and Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966)).

Unlike Mr. Turley, the state has not shown that it was affirmatively misadvised of the consequences of its plea decision.[3] The state cites nothing from the trial court record to show that its objective (or even subjective) intent was to prevent Ms. Knight from appealing or from arguing double jeopardy. The state's motion only shows a unilateral, very late, and unsworn assertion of the state's

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trial court's finding that Perkins made a knowing, intelligent and voluntary waiver of that right); c.f., State v. Larson, 128 Wn. App. 1071, 2005 Wash. App. LEXIS 2063 (noting that Larson's plea specifically waived his right to argue double jeopardy). Knight does not cite the unpublished decision in Larson as "authority" on any legal proposition, RAP 10.4(h), but rather as a factual illustration of how easy it is for the state to draft such agreements when it intends them.

[3] This sentence charitably assumes that counsel for the state would have a right to such advice. Actually, the due process right to advisement of sentencing consequences applies only to real people, not the government. The constitution instead is designed to protect the rights of real people from the government.

potential belief that the plea agreement somehow precluded Ms. Knight from raising a double jeopardy claim on appeal.

The state's assertion not only lacks support in the trial record, it is apparently newfound on appeal, as well. Ms. Knight filed her briefs in November of 2005 and February of this year. The same appellate prosecutor responded to both briefs. The state does not explain its decision not to raise this issue until after this Court filed its opinion. If any legitimate explanation exists it would have to be a very interesting one, particularly in light of: (1) the clarity of the relief requested in both of Ms. Knight's briefs, and (2) the statements in both of Ms. Knight's briefs that the plea agreement is not undercut by the sentencing issues she raised on appeal. BOA at 3, n.3; Supp'l BOA at 7, n.4. Ms. Knight's position was both consistent and clearly stated throughout this appeal, unlike the state's new surprise.

The rule governing motions for reconsideration requires a motion to "state with particularity the points of fact or law which the moving party contends the court has overlooked or misapprehended[.]" RAP 12.4(c). The state's motion does not show anything this Court overlooked or misapprehended because the state did not raise this issue. No factual findings support the state's

position. And where the state's newly cited authority is so clearly distinguishable, reconsideration is not supported by the cited law.

In short, the state's late effort to undercut the plea agreement is not supported by the facts or the law. Given its facial frivolity, it may be merely a petulant reaction to this Court's decision, intended to make Ms. Knight uncomfortable.[4] Nonetheless, given the stakes, Ms. Knight must treat the motion seriously.

The lateness of the state's motion may also be a deliberate appellate tactic, as it could deny Ms. Knight a fair opportunity to address the merits if the appellate court does not request an answer. RAP 12.4(d) (an answer should not be filed unless requested by the appellate court). It also could prevent this Court from fully addressing the merits of the issue, because in counsel's experience, if a motion to reconsider raises an issue not briefed by the parties, an appellate court often will simply deny the motion without further comment.

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[4] Ms. Knight pled guilty to second degree murder. Now that she has testified, the state apparently seeks to recharge her with first degree murder.

The state may also be gambling that its tactical delay could support review of this Court's decision.[5] Given the state's plan for further review, it is possible the state deliberately laid in the weeds on this issue to bypass this Court. By so doing, it could add the claim to its petition for review without saddling the claim with this Court's full rejection of the merits. Such tactical machinations are inappropriate and deny Ms. Knight and this Court the fair opportunity to brief and consider the claim.

Despite all of these problems, the state boldly asserts "the only fair resolution" is to "rescind the entire plea bargain, reset the case to the beginning and allow the parties to start over." Motion, at 3. This relief certainly was not granted in Ermels. And Turley was only permitted to withdraw his plea because he showed a "manifest injustice" regarding the misadvisement of a direct sentencing consequence. The state has made no factual showing whatsoever,

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[5] It is apparent that the state will seek further review of this Court's decision, as counsel for both parties have discussed this in post-decision correspondence. The state also has filed a petition for review in the Williams case, which addresses the same double jeopardy claim, so most of the state's work on the double jeopardy issue is already done. State v. Williams, 131 Wn. App. 488, 128 P.3d 98 (2006), review pending, No. 78397-7.

let alone something comparable to Turley's showing, to undercut this plea agreement.

More importantly, the state's requested remedy would be completely one-sided and unjust. Cf. Turley, at 401 (even where Turley clearly showed a manifest injustice, the court still had to determine whether the remedy of withdrawal was unjust). It is extremely unlikely that the state truly seeks to "start over", i.e. to not only vacate Ms. Knight's convictions, but to also vacate both of the codefendants' multiple convictions, to scrub Ms. Knight's testimony from all records and files, and to blind the state in all ways to the important factual information it learned from Ms. Knight's cooperation under the plea agreement.

In short, the state does not seek a fair resolution of this matter, it instead seeks to externalize the consequences of any unilateral (yet still unproved) mistake it may have made in drafting the plea agreement. But no authority supports that relief. If the state wanted Ms. Knight to waive her right to appeal and to argue double jeopardy, it could and should have included that in the deal. It did not. Absent express language, waiver will not be presumed. See cases cited in note 2, supra; State v. Kells, 134 Wn.2d at 313-14.

Ms. Knight respectfully asserts there is nothing "fair" or just about undermining a plea agreement after she has fully performed her part of the bargain. She cannot be restored to her pre-plea status and she has never sought to withdraw her plea. She has, instead, sought a remedy on appeal supported by settled Washington law. She forthrightly performed her part of the bargain both in the trial court and in giving the state consistent and clear notice of her position on appeal. For all these reasons, there is nothing fair about the state's late claim and meritless motion. The motion should be denied.

IV. CONCLUSION

This Court should deny the state's motion for reconsideration.

DATED THIS 7th day of August, 2006.

Respectfully submitted,

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